JASHIN SCAFFOLDING (M) SDN BHD

v.

CHEW AI ENG SDN BHD;
OCBC BANK (MALAYSIA) BHD (APPLICANT)

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[COMPANIES (WINDING-UP) NO: D5(D9)-28-884-2000]
25 MAY 2004

LAND LAW: *Charge - Deed of assignment - Absolute assignment - Default of repayment by assignor - Whether assignee a secured creditor for purpose of assignor's liquidation - Whether necessary to create a charge in assignee's favour before proceeding with foreclosure of property - Whether creation of charge would constitute undue preference against general body of creditors*

BANKING: *Securities for advances - Deed of assignment - Assignment of property as security for banking facilities - Default of repayment by assignor - Whether assignee a secured creditor for purpose of assignor's liquidation - Whether necessary to create a charge in assignee's favour before proceeding with foreclosure of property - Whether creation of charge would constitute undue preference against general body of creditors*

The applicant had granted banking facilities to the respondent; the respondent assigned certain property ('the said property') to the applicant as security for the said facilities. For that purpose, they entered into a deed of assignment. Upon default of repayment by the respondent (which was subsequently wound-up), the applicant obtained an order to commence foreclosure proceedings and issued a notice of demand to the liquidator for the respondent ('the liquidator') for the total amount due. The applicant was then informed in a valuation report that the strata title for the said property had been issued by the relevant land registry. The applicant averred that although it had, as the absolute assignee, the right and power to sell the said property directly without having to apply for an order for sale from the court, when the strata title was issued, a registered charge should be created over the said property before the applicant could proceed with foreclosure. The applicant thus informed the liquidator of its intention to apply for leave from this court to create a charge of the said property as per the agreed terms in the deed of assignment. The liquidator objected to this application. The issues requiring determination were: (i) whether the applicant herein was a secured creditor of the respondent; (ii) whether there

was a necessity to create the proposed charge; and (iii) whether the proposed creation of the charge against the said property would be undue preference against the general body of creditors.

Held (allowing the application):

[1] In the present case, the applicant was a secured creditor of the respondent as it held an absolute assignment of the said property pursuant to the said deed of assignment and power of attorney. By virtue of this status as an absolute assignee, the applicant was a secured creditor for the purpose of the respondent's liquidation and was not obliged to submit any proof of debt with the liquidator. (pp 503 h, 505 h & 506 a)

[2] Despite the existence of the deed of assignment in the applicant's favour, the applicant could neither realise nor dispose of the said property by way of a public auction without the respondent taking the transfer of the registered ownership of the said property from the developer and one Messrs Brilliant Profile Sdn Bhd (the registered owner of the said property) and the creation of a charge in the applicant's favour before proceeding with foreclosure of the said property, since the applicant could not possess better rights over the said property compared to the respondent, who only had contractual rights to sue the developer and the original master title owner. (p 509 d-f)

[2a] The liquidator, in liquidation, was not entitled to deal with the said property. The respondent had absolutely assigned the said property to the applicant and had contracted to transfer the said property, and thereafter, to create a charge in favour of the applicant. Likewise, the liquidator should be bound by the contractual terms earlier agreed to by the respondent. (p 510 b)

[3] The contention that the effect of the transaction was to confer on the applicant a preference, priority or advantage over the other creditors was not satisfied. The proposed creation of a charge would, in fact, confer upon the respondent the benefit of a *right in rem* or a real right in the said property as the title to the said property would be registered in the name of the respondent before the creation of the proposed charge. In contrast, the status or position of the applicant would be downgraded from an absolute owner to a chargee who would only be entitled to certain rights in the said property pursuant to the National Land Code. (p 512 g-h)

[3a] The liquidator's submission that the proposed charge would amount to a transfer of the respondent's property and thus void or voidable under s. 293(1) of the Companies Act 1965 was misconceived in law as a charge does not involve a transfer of title or property. The applicant herein merely sought the court's leave for the creation of the proposed charge in its favour and not to take the transfer of the said property. (p 513 c)

[4] In the circumstances of the present case, this was an appropriate case for the court to exercise its discretion in favour of the applicant. Therefore, the applicant's application and the consequential reliefs prayed for were granted. (pp 513 h & 514 d)

Case(s) referred to:

Director of Customs, Federal Territory v. Lee Cheng Chye (Liquidator of Castwell Sdn Bhd (In liquidation) [1995] 3 CLJ 316 SC ***(foll)***

Emporium Jaya (Bentong) Sdn Bhd (In Liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd [2002] 3 CLJ 10 HC ***(refd)***

K Balasubramaniam v. MBf Finance Bhd & Ors [2003] 3 CLJ 370 CA ***(foll)***

Lian Keow Sdn Bhd (In Liquadation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 ***(foll)***

Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(foll)***

Ooi Chin Nee v. Citibank Bhd [2003] 1 CLJ 548 HC ***(foll)***

Pancaran Nilam (M) Sdn Bhd v. Malayan Banking Bhd & Another Appeal [2000] 4 CLJ 793 CA ***(foll)***

Philleo Allied Bank (M) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 CA ***(foll)***

Sime Diamond Leasing (M) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd (In Liquidation) [1998] 4 CLJ 557 FC ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, s. 2
Companies Act 1965, ss. 108, 226(3)(a), 233(1), 277(5), 293(1)
Companies (Winding-Up) Rules 1972, r. 78
National Land Code, s. 292(1)

Other source(s) referred to:

The Companies Winding-Up Handbook, MLJ Handbook Series 2003, p 275

For the applicant - CK Ung; M/s Cheong Wai Meng & Van Buerle
For the liquidator - SY Lim; M/s Paul Ong & Assoc

Reported by Suresh Nathan

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JUDGMENT

Ramly Ali J:

The applicant in the present proceeding is a licenced financial institution incorporated in Malaysia, having a branch office at No: 36, Beach Street, 10300 Penang and an absolute assignee of the property known as Petak No. C 2.06, Tingkat No. 2, Kompleks Adorna, Jalan Brick Klin, Pulau Pinang erected on a part of Lot No. 492, Seksyen 10, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang comprised in Geran No: 1854 ("the said property).

The respondent is a company incorporated in Malaysia and having its last known address at No: 272-K, Jalan Air Itam, 11400 Penang; or at 413-4-F-A, Wisma Chuan Bee No: 413 Chulia Street, 10200 Penang or at 107-2-06 Adorna Complex, Gudwara Road, 10300 Penang. The respondent was wound-up by an order dated 18 January 2001 of the Kuala Lumpur High Court Companies (Winding-Up) No: D9-28-882-2000 and Messrs. S.K. Tee & Co. were appointed as liquidator of the respondent.

Via the notice of motion dated 16 October 2003 (encl. 25) the applicant seeks, *inter alia*, the following orders:

(i) that leave be granted by this court to the applicant, OCBC Bank (Malaysia) Berhad to intervene in the matter herein;

(ii) that the applicant, OCBC Bank (Malaysia) Berhad, may exercise its power *vide* power of attorney dated 23 January 1995 to do all acts necessary to create, execute or complete a registered charge over the said property, in the event the liquidator for Chew Ai Eng Sdn. Bhd., failed, neglected or refused to comply with the court order herein within six weeks from date of service of this order;

(iii) alternatively, that leave be granted by this court to Mr. Tee Siew Kai, the liquidator of Chew Ai Eng Sdn. Bhd., to do all acts necessary to create a registered charge over the property known as Grant HBM 127/M1/2/8 ("the said property) in favour of the applicant OCBC Bank (Malaysia) Berhad;

(iv) that Mr. Tee Siew Kai, the liquidator for Chew Ai Eng Sdn. Bhd., shall do all acts necessary to create a registered charge over the said property in favour of the applicant, OCBC Bank (Malaysia) Berhad;

(v) that the creation of the registered charge over the property known as Grant HBM 127/M1/2/8 shall not be avoided under s. 293 of the Companies Act 1965;

(vi) that leave be granted by this court under s. 226(3)(a) of the Companies Act 1965 to the applicant, OCBC Bank (Malaysia) Berhad, to commence, continue and proceed with an application for an order for sale in the High Court of Malaya at Penang to foreclose the said property known as Grant HBM 127/M1/2/8 after the creation of the registered charge in favour of the applicant.

At all material times, the respondent is a client or borrower of the applicant. The respondent is the purchaser and assignor of the said property. At the request of the respondent, *vide* facility agreements dated 17 June 1997 and 23 January 1995 the applicant had granted banking facilities ("the said facilities") to the respondent in the following manner:

(a) Overdraft Facility of RM300,000;

(b) LC/TR/BA/SG/LG facilities of RM180,000; and

(c) FX Line Facility of RM18,000.

In consideration of the applicant granting the said facilities, the respondent assigned absolutely the said property to the applicant as security for the said facilities. For that purpose, a deed of assignment dated 23 January 1995 was entered into between the applicant and the respondent.

Thereafter the respondent defaulted in making its monthly repayments to the applicant and the applicant's solicitors had, on the applicant's behalf, issued a notice of demand dated 16 May 2001 to the respondent's guarantors and requires them to repay the total outstanding due under the said facilities. Upon the respondent's default in payment and the guarantors' failure to respond to the said notice of demand, the applicant then instructed its solicitors to commence civil proceedings to recover the outstanding sum as well as to commence foreclosure proceedings to realise the said properties assigned as security by the respondent. Thereafter, the applicant had on 19 November 2001 obtained an order under s. 226(3) of the Companies Act 1965 from this court to commence, continue and proceed with their foreclosure proceedings in Penang High Court to foreclose the said property. Upon obtaining the sealed order dated 19 November 2001 the applicant *via* its solicitors issued a notice of demand dated 14 June 2002 to the liquidator for the respondent demanding for the payment of the total amount due and owing to the applicant. The liquidator has failed to heed the said notice of demand.

The applicant has instructed a property consulting firm, Messrs. Rahini & Co. to value the said property for the purpose of commencing the foreclosure application and was informed in the valuation report dated 29 April 2002 that the strata title for the said property has been issued by the relevant land registry and the particulars are Geran HBM 127/M1/2/8. The applicant took the stand that although the applicant as the absolute assignee of the said property has the right and power to sell the said property directly without having to apply for order for sale from the court, it is the applicant's view that when the strata title to the said property is issued, a registered charge should be created over the said property before the applicant can proceed with any foreclosure proceeding to sell the said property and recover the amount outstanding due and owing by the respondent.

Via cl. 4.13 of the deed of assignment dated 23 January 1995 the respondent had agreed, amongst other things, that upon issuance of the strata title to the said property, the respondent "shall at its own cost and expense and immediately upon being so required to do so by notice in writing from the applicant or its solicitors to take transfer of the said property and to create or execute a statutory charge over the said property as security for the loan from the applicant."

The respondent had also executed two (2) power of attorney agreements dated 23 January 1995 and 17 June 1997 respectively and expressly agreed and appointed the applicant as its attorney in respect of the said property with full power of substitution, amongst others, to take delivery and transfer of the strata title to the said property and to create or complete and perfect a charge under the provisions of the National Land Code over the said property in favour of the applicant and to register the charge with the appropriate registering authority.

The applicant on 6 May 2003 *via* its solicitors wrote and informed the liquidator for the respondent of its intention to apply for leave from this court to create a charge of the said property as per the agreed terms in the deed of assignment but to date no reply has been forthcoming from the liquidator.

The liquidator of the respondent is objecting to this application by the applicant on the ground that the proposed creation of the charge over the said property would constitute an undue preference under s. 293 of the Companies Act 1965 as the applicant would become a secured creditor of the respondent by virtue of the proposed charge over the said property.

The liquidator further contended that the only proper person to sell and/or dispose of the respondent's property will be the appointed liquidator in accordance with the express provisions of the Companies Act 1965.

Issues To Be Determined

Based on the above premise, he issues to be determined by this court are as follows:

(i) whether the applicant herein is a secured creditor of the respondent company;

(ii) whether there is a necessity to create the proposed charge; and

(iii) whether the proposed creation of the charge against the said property would be undue preference against the general body of creditors.

Findings Of Court

The court shall now deal with the three issues one by one.

1st Issue: Whether The Applicant Is A Secured Creditor Of The Respondent Company

The liquidator has submitted that the applicant is not a creditor and has no *locus standi* to maintain this application because the applicant has not filed its proof of debt with the liquidator and there is no evidence whatsoever that the liquidator has approved the applicant's proof of debt.

The words "secured creditor" is not defined in the Companies Act 1965. However, pursuant to s. 293(1) of the Act, the law of bankruptcy as to fraudulent preference is applicable to the winding-up of a company by the court. (See the decision of the Supreme Court in *Lian Keow Sdn. Bhd. (In Liquadation) & Anor v. Overseas Credit Finance (M) Sdn. Bhd. & Ors.* [1988] 2 MLJ 449). As such the definition of the words "secured creditor" in s. 2 of the Bankruptcy Act 1967 would be helpful. Section 2 of the Bankruptcy Act 1967 defines "secured creditor" as a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment."

In the present case, the applicant is a secured creditor of the respondent company as it holds an absolute assignment of the said property pursuant to the said Deed of Assignment and the Power of Attorney. Clause 4.1 of the said deed of assignment stipulates:

4.1. Pursuant to the terms of the Principal Instrument and in consideration of the Lender having at the request of the Assignor granted or made available or agreed to grant or make available or to continue to grant and make available the Facility and for better securing the repayment and payment of the Indebtedness, the Assignor as beneficial owner hereby assigns absolutely to the Lender the Assigned Property together with the Assignor's right of the enforcement thereof ...

This court finds that the said deed of assignment is infact absolute in nature. In this respect, the court refers to the Federal Court case of *Philleo Allied Bank (M) Bhd. v. Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 CLJ 621 wherein Justice Abdul Malek Ahmad FCJ held as follows:

In *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231, the appellant had purchased from the developer a shop office unit in a multi-storey shopping and office complex to be erected on land in Johor Bahru for the sum RM184,320.00. Subsequently, the appellant entered into an agreement with Public Bank which agreed to give the appellant a fixed loan of RM92,160.00. The appellant also executed an assignment to the bank of all his rights, title and interest in the property pending the issue of the strata title. Subsequently, the Respondent purchased from the developer the whole shopping and office complex, excluding the units already sold by the developer. The appellant commenced proceedings against the Respondent for certain declaratory relief. After the filing of the originating summons, the assignment was revoked following the repayment and settlement of the fixed loan. A preliminary objection was taken by the Respondent that the action could not be maintained in the name of the appellant as assignor. The learned judicial commissioner upheld the objection and struck out the proceedings. The appellant appealed.

It was held by the Federal Court (Wan Suleiman, Seah and Mohamed Azmi FCJJ) that whether or not an agreement is an absolute one, not purporting to be by way of charge only, within the meaning of s. 4(3) of the CLA, is to be gathered only from the four corners of the instrument itself, and the document in this case was an absolute assignment not purporting to be a charge only within the meaning of that provision, and therefore, the appellant was not competent to maintain the action when it was filed.

On appeal, in *Hipparion (M) Sdn. Bhd. v. Chung Khiaw Bank Ltd.* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41, it was held by the Supreme Court (Abdul Hamid LP, Mohamed Azmi and Gunn Chit Tuan SCJJ) that the deed in this case was an absolute assignment and not purporting to be by way of charge only within the meaning of s. 4(3) of the CLA. The deed clearly purports, and is intended in point of form, to be an absolute assignment because of the use of the word 'absolutely'. The intention of

the parties clearly was that the deed should be absolute in the sense that the assignee should have all that rights, title and intent of the assignor in the sale and purchase agreement. A document given by way of charge is not one which absolutely transfers the property.

The said *Bupinder* case is on all fours with our present case as the clauses (cls. 8, 23.4 and 26) in the deed of assignment referred to by the Federal Court in that case are similar to the respective relevant clauses (cls. 4.1, 4.3(5) and 4.13) in the present deed of assignment.

Being an absolute assignee the position of the applicant ranks higher than a secured creditor in the respondent's liquidation. This principle was confirmed by Justice Mokhtar Sidin JCA in the case of *Pancaran Nilam (M) Sdn. Bhd. v. Malayan Banking Bhd. & Another Appeal* [2000] 4 CLJ 793 (Court of Appeal) as follows:

An assignment (whether absolute or otherwise) is an equitable mortgage. But when it is an absolute assignment, it ranks higher than a charge and the property is transferred absolutely to the assignee when the assignor defaulted in making repayments. The assignee can proceed to sell the property under O. 31 of the RHC. There is no harm if the assignee elects to sell the property under O. 83 of the RHC.

The Plaintiff in the present appeal was right in applying for sale of the property under O. 31 because of the absolute assignment and the irrevocable power of attorney. From the record, it was clear that the Defendant did not dispute the fact that the assignment was an absolute assignment. The trial judge was right in granting the order for sale under O. 31 of the RHC.

The liquidator in the present case has submitted that the applicant is not a creditor, and has no *locus standi* to maintain the present application because the applicant has not filed its proof of debt with the liquidator and there is no evidence at all to show that the liquidator has approved the applicant's proof of debt. With respect, the court finds that this submission is devoid of merits. The liquidator ignored the fact that the applicant herein is an absolute assignee of the said property and by virtue of the said status the applicant is a secured creditor for the purpose of the respondent's liquidation. The liquidator has taken a simplistic approach in determining as to whether the applicant is a creditor. Rule 78, of the Companies (Winding-Up) Rules 1972 could not be interpreted to mean a person who has not filed a proof of debt with the liquidator is therefore not a creditor in the respondent's liquidation. Being a secured creditor (pursuant to the deed of assignment and power of attorney) the applicant is entitled to stand

aloof from the respondent's liquidation and is not obliged to submit proof of debt with the liquidator. This principle was adopted by the Supreme Court in *Director of Customs, Federal Territory v. Lee Cheng Chye (Liquidator of Castwell Sdn. Bhd. (In liquidation)* [1995] 3 CLJ 316. In another case, *K. Balasubramaniam v. MBF Finance Bhd. & Ors* [2003] 3 CLJ 370, the Court of Appeal held:

> A secured creditor is not obliged to submit proof of debt and can rely on his security by virtue of s. 291(1) and (2) of the Companies Act 1965 and Schedule C (s. 2) of the Bankruptcy Act 1967. The combined effect of the above provisions is that a secured Creditor may submit proof of debt and if he does, he will be entitled to a dividend in respect of the unsecured portion: (see items 9, 10 and 11 of Schedule C). If the secured creditor does not submit proof of debt then pursuant to item 16 of Schedule C of the Bankruptcy Act 1969 the secured Creditor shall be excluded from participating in a dividend.
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> The Federal Court in *Director of Customs Federal Territory*'s case *(supra)* considered the position of a secured creditor in a winding-up and concluded that the secured creditor stands outside the liquidation but may come in under the liquidation. There is clearly no mandatory requirement under s. 291(1) and (2) for a secured creditor to come under a winding-up and prove his debt.

On the above considerations, the answer to the first issue must be in the affirmative: ie, that the applicant herein is a secured creditor of the respondent company.

2nd Issue: Whether There Is A Necessity To Create The Proposed Charge To The Said Property

One could ask that – since the applicant is the absolute assignee, why does it not proceed with the rights under the said deed of assignment and power of attorney given by the respondent in the applicant's favour to sell the said property in its effort to recover the debt by way of public auction, without a court order instead of creating the proposed charge and thereafter proceeding with foreclosure in court. One could further argue that this stand was endorsed in the Federal Court case of *Bupinder* where it was held that:

> In the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a Court order to realise its security under an absolute assignment of rights to land, the Court should give effect to and recognise the contractual rights to land, the Court should give effect to recognise the contractual rights as determined between the vendor and the purchaser.

However, it is an undisputed fact in the present case that the strata title to the said property has been issued by the relevant authorities and is now known as Grant HBM 127/M1/2/8 and it is currently, registered in the name of the original master title owner (Messrs. Brilliant Profile Sdn. Bhd.) who has together with the Developer (Messrs. MKDV Sdn. Bhd.) given consent to the absolute assignment of the said property from the respondent to the applicant.

The court realises that in such a situation, the applicant has no other option but to create the proposed charge. In this respect the court fully agrees with Justice RK Nathan in the case of *Ooi Chin Nee v. Citibank Bhd.* [2003] 1 CLJ 548 when he held (at p. 555-556) as follows:

> It is my judgment therefore that in pursuance of their contractual rights, when there is an issue document of title as in this case, the Plaintiff must get the property transferred to his name and then register a charge in favour of the Defendant/bank. The present conduct of the bank in proceeding with the proclamation of sale is clearly an attempt to circumvent s. 4.05 of the Deed of Assignment. In fact in *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] 2 CLJ 56; [1985] CLJ (Rep) 231 FC, the Federal Court held that whether or not an agreement is an absolute one (not purporting to be by way of a charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four comers of the instrument itself. Therefore as in this case s. 4.05 of the Deed of Assignment clearly spells out what the Plaintiff ought to do. He ought to, upon the issuance of a registered document of title to the property, take a transfer of the property and at his own cost execute a statutory charge in the form prescribed in the NLC in favour of the Defendant. Once this is done then the Defendant will have to apply to Court for leave to foreclose.

It is trite law that only the registered proprietor or the person in whose name any lease, charge or easement is for the time being registered has the right to deal with the land as provided in s. 292(1) of the National Land Code which provides as follows:

> 292 Instruments capable of being registered, and method of presentation therefore
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> (1) The following instruments may be registered under this Part, and may be presented to the Registrar for that purpose in accordance with the provisions of sub-section (2):
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> (a) any transfer under Part Fourteen of land, of an undivided share in land, or of any lease, sub-lease or charge;

(b) any lease, sub-lease or surrender thereof under Part Fifteen;

(c) any charge, discharge or instrument of postponement under Part Sixteen;

(d) any certificate of sale under Part Sixteen; and

(e) any instrument granting or releasing any easement under Part Seventeen.

In this respect the court refers to the Supreme Court case of *Lian Keow Sdn. Bhd. (In liquidation) & Anor v. Overseas Credit Finance (M) Sdn. Bhd. & Ors* [1988] 2 MLJ 449, where in Justice Syed Agil Barakhbah SCJ held:

> The exercise of jurisdiction in personam should be distinguished with the exercise of jurisdiction in rem. It is important to note that the doctrine of English equity does not apply with equal force to the system of registration of title to land contained in the Code. The distinction between registered and unregistered interest in land under the Code is different from that in the English law between legal estates and equitable interests in land. The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interests in land by way of equitable trust. The position is made clear from some authorities on the matter. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right in personam, ie, he acquires the right to the land as against the vendor personally but not good against the whole world. However, upon registration in accordance with the Code in his name, the vendor acquires a right in rem, ie, a real right good against the world as a whole (*Bachan Singh v. Mahinder Kaur & Ors* [1956] MLJ 97). Prior to registration of the title, the statutory form of transfer under the Code gives a title in equity to the purchaser until registration. The vendor is said to hold his proprietary interest as a constructive trustee. As soon as the transfer of title is registered in his name, the estate or interest of the transferor as set forth in the instrument with all rights, powers and privileges thereto pass to the purchaser (transferee). In order to protect such equitable interest or estate, prior to the registration of transfer, a caveat may be lodged with the Registrar, and so long as it remains without being removed, it imposes restrictions on the entry in the register of dealings in land (*Bachan Singh v. Mahinder Kaur & Ors* [1956] MLJ 97; *Abigail v. Lapin* [1934] AC 49). If the vendor commits a breach of the agreement by refusing to transfer the land to the purchaser, the latter may file a suit for specific performance of the agreement.

The sum total of the authorities cited may be summarized as follows:

(a) Where there is in the existence a right in personam or an equitable right prior to the registration of title to the land, the equitable principles of remedies may be applied;

(b) However, upon registration of the transfer of the said land of the purchaser who thereby obtains a right in rem or a real right in the property, the express provisions of the Code will apply to the exclusion of equitable principles.

Applying the above principles to the facts of the present case, it seems that only Messrs. Brilliant Profile Sdn. Bhd. (who is currently the registered owner of the said property) has the right to deal with the said property. The respondent has no rights to deal with the said property yet as it is not the registered owner and the respondent only has the contractual rights of specific performance against the Developer and Messrs. Brilliant Profile Sdn. Bhd. to effect the transfer of the said property to the respondent. Until and unless the said property is transferred and registered in the respondent's name, the respondent only has beneficial rights in the said property. The same applies to the applicant despite the existence of the said deed of assignment in the applicant's favour. As such, the applicant cannot realise or dispose of the said property by way of public auction without the respondent taking the transfer of the registered ownership of the said property from the Developer and Messrs. Brilliant Profile Sdn. Bhd. and the creation of a charge in the applicant's favour before proceeding with foreclosure of the said property, as the applicant cannot possess better rights over the said property than the respondent company who only has contractual rights to sue the developer and the said original master title owner.

The liquidator's submission seems to imply that since the liquidation of the respondent company, the liquidator is vested with the custody and control of all property of the company irrespective of whether it is encumbered or given as security to the secured creditor by virtue of s. 233(1) of the Companies Act 1965 and allegedly, the proposed creation of a charge will be usurpation of the liquidator's powers. The liquidator further submitted that the issue of whether to create the proposed charge should be left to the liquidator's discretion.

Again, the court cannot accept this submission. In the present case, the liquidator does not have a better right than the respondent company in its liquidation. The respondent company does not have a right to demand from the applicant to hand over the said property to it until fully redeemed. Therefore, in liquidation the liquidator is not entitled to deal with the said property. The respondent has absolutely assigned the said property to the applicant and has contracted to transfer the said property and thereafter, to create charge in favour of the applicant. The liquidator likewise should be bound by the contractual terms earlier agreed to by the respondent. In this respect, the court refers to ss. 233(1) and 277(5) of the Companies Act 1965 which provide as follows:

> S. 233(1) Where a winding up order has been made or a provisional Liquidator has been appointed, the Liquidator or provisional Liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.
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> S. 277(5) The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the Liquidator or provisional Liquidator forthwith or within such time as the Court directs any money, property, books and papers in his hands to which the company is *prima facie* entitled.

Section 233(1) clearly stipulates that the liquidator in dealing with a company in liquidation shall only take into his custody or control all property and things in action which the company is or appears to be entitled and in the case of s. 277(5), only those property to which the company is *prima facie* entitled. Again, in this respect, the court refers to the decision of the Court of Appeal in *K. Balasubramaniam (supra)* where Justice Mohd Saari Jusoh JCA, held (at p. 376):

> The question which arises is, is the Liquidator *prima facie* entitled to the movable asset in the present case pursuant to s. 233(1) and s. 277(5)? In the light of *Director of Custom F.T.*'s case *(supra)* and *Mahadevan*'s case *(supra)*, our view is that the company is not *prima facie* entitled to the moveable asset.
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> It is common ground that the debenture in the present case was registered under s. 108 of the Company Act 1965, meaning that the 1st Respondent as debenture holder was a chargee of equitable charge. Assuming KCL was not in liquidation, it is incumbent upon KCL to redeem it before R&M could be compelled to hand over the movable asset to KCL. Thus, turning to the present case, why should the Liquidator's right be greater than that

of KCL? In the light of our finding in para 13 herein, R&M could not be compelled to hand over the movable asset to the Liquidator. KCL is only entitled to equity of redemption and it follows, therefore, that the Liquidator is only entitled to exercise his right of redemption.

3rd Issue: Whether The Proposed Creation Of The Charge Against The Said Property Would Be Undue Preference Against The General Body Of Creditors

As stated earlier, the applicant here being an absolute assignee of the said property stands in a better position than the other secured or unsecured creditors. Therefore there is no question of undue preference as alleged by the liquidator. In this respect, the court refers to the explanatory notes to s. 292 of the Companies Act 1965 in "*The Companies Winding-Up Handbook, MLJ Handbook Series 2003"* at p. 275 which states:

> Secured Debts. Secured creditors need not prove for their debts but can realise their security and obtain full satisfaction. See *Re Longdendale Cotton Spinning Co.* [1878] 8 Ch D 150; *Re Lewis Merthyr Consolidated Collieries Ltd.* [1929] 1 Ch 498 (applied in *Re GL Saunders Ltd.* [1986] 1 WLR 215); *Re Christonette International Lte*. [1982] 3 All ER 225; *Shirlaw v. Taylor* [1991] 5 ACSR 767 (FC, Australia). If the security is inadequate, they may prove as unsecured creditors for the balance. A liquidator may of course challenge the validity of the security and its registration. Furthermore, preferential debts owed to employees are payable out of the assets subject to a floating charge: subs (4).

In cases where the company is insolvent the interest of creditors is paramount and in a winding-up, unsecured creditors rank *pari passu*. "(see: *Emporium Jaya (Bentong) Sdn. Bhd. (In Liquidation) v. Emporium Jaya (Jerantut) Sdn. Bhd.* [2002] 3 CLJ 10). The Supreme Court in case of *Sime Diamond Leasing (M) Sdn. Bhd. v. JB Precision Moulding Industries Sdn. Bhd. (In Liquidation)* [1998] 4 CLJ 557 had held:

> The law relating to fraudulent preferences is set out in s. 53 of the Bankruptcy Act, which is made applicable to companies by s. 293 of the Companies Act, and is designed to preserve the sanctity of the *pari passu* principle by which creditors in a winding-up share rateably in the assets available for distribution. As in bankruptcy cases, a creditor of a company is not entitled to a set-off against his obligation to repay the preference. (See, *Re A Debtor* [1927] 1 Ch 97; *Calzaturificio Zenith Pty. Ltd. v. NSW Leather and Trading Co. Pty. Ltd.* [1970] VR 605).

It is also trite law that the rules of bankruptcy as to fraudulent preferences are applicable to the winding-up of companies (see: Justice Seah SCJ, Supreme Court in *Lian Keow* case *(supra)*. The object of the rules of bankruptcy as to fraudulent preferences is to prevent a creditor from obtaining for himself an unfair advantage at the expense of other creditors by concluding a transaction with the company during what has been called the twilight period which precedes winding-up. In the case of *Sime Diamond Leasing (supra)*, it was further held by the Supreme Court that:

> To take the matter further, it is clear law that the Court has no power to make an order setting aside payments and transfers made in the run-up to bankruptcy in favour of a particular creditor which were designed to prefer him over other creditors unless the following five conditions are satisfied:
>
> (1) that the transaction in question took place within six months prior to the commencement of winding-up;
>
> (2) that it satisfies the description of one of the types of transactions mentioned in s. 53(1) of Bankruptcy Act;
>
> (3) that it took place at a time when the company was insolvent;
>
> (4) that the person in whose favour the transaction was effected stood in the relation of creditor to the Company; and
>
> (5) the effect of the transaction was to confer on that person a preference, priority or advantage over other creditors in the winding-up.
>
> The onus was, of course upon the Liquidator to satisfy all the five requirements aforesaid.

In the present case, the liquidator's argument relating to undue preference will only hold water if **all** the five (5) requirements or conditions laid down by the Supreme Court in *Sime Diamond* have been satisfied. The onus is on the liquidator to satisfy all the five requirements aforesaid. In this respect, the court is convinced that the effect of the transaction was to confer on the applicant a preference, priority or advantage over other creditors in the winding-up, is not satisfied. The proposed creation of a charge will in fact confer upon the respondent the benefit of a right in rem or a real right in the said property, as before the creation of the proposed charge, the title to the said property will be registered in the name of the respondent. In contrast the status or position of the applicant will be down graded from an absolute owner (pursuant to the absolute assignment) to a chargee who will only be entitled to certain rights in the said property pursuant to the National Land Code.

The creation of a charge over the said property will not prejudice the respondent or other creditors of the respondent at large as the said property was earlier assigned absolutely to the applicant in 1995. Further, the creation of a registered charge under the National Land Code will put the said property under the auspices of the provisions of the Code and thus put the sale of the said property under direct supervision of the court.

The liquidator has submitted that the proposed charge would amount to a transfer of the respondent's property and was void or voidable under s. 293(1) of the Companies Act 1965. With respect, this submission is misconcevied in law. First and foremost, there is a crucial distinction between a transfer and a charge as well as the characteristic of a mortgage and a charge. A charge does not involve a transfer of title or property. This was clearly stated by the Federal Court in the *Bupinder* case, where it was held:

> Although there is a well-known distinction between a mortgage where a borrower's land is usually transferred or assigned subject to the equity of redemption and a charge where such land is not transferred or assigned at all but it gives the chargee rights over the land, a charge of land has always been regarded as a species of mortgage for most practical purposes; see *Law of Real Property* by Sir Robert Megarry (former Vice Chancellor of Supreme Court of the United Kingdom) and HSR Wade (5th Ed) at p 94.

The applicant herein merely seeks the court's leave for the creation of the proposed charge in the applicant's favour and not to take the transfer of the said property. The said property has to be transferred in the name of the respondent company first before the creation of the proposed charge. The respondent company has absolutely assigned the said property to the applicant and has contracted to take transfer of the said property and thereafter, to create a charge in the applicant's favour. The liquidator likewise should be bound by the contractual terms earlier agreed by the respondent company.

Conclusion

Based on the above considerations and the circumstances of the present case, the court is convinced that this is an appropriate case for the court to exercise it's discretion in favour of the applicant. Therefore, the court has no hesitation in granting the applicant's application as per encl. 25.

In the said encl. 25, the applicant also prays for "any other relief deemed just and reasonable by this Honourable Court". Under this heading, the applicant prays for the following consequential reliefs; namely:

(i) the applicant is allowed to register the said charge with the Registrar of Companies pursuant to s. 108 of the Companies Act 1965 and the Registrar of Companies is hereby ordered and directed to give full effect to this order;

(ii) the land office and other relevant authorities is hereby ordered and directed to give full effect to this order;

(iii) all the necessary costs and expenses (including the applicant's solicitors fees on a solicitors and client's basis), stamp and registration fees for effecting the registration of the transfer of the said property and the creation of the said charge be borne by the respondent and the applicant is hereby allowed to debit the same from the respondent's account.

(iv) The costs of this application on a solicitors and client's basis be borne by the respondent.

Prayers (i), (ii) and (iv) above are necessary and consequential upon an order in terms of the application in encl. 25, whilst prayer (iii) above has been agreed upon by the respondent under cl. 4.13 of the said deed of assignment.

The court has the discretion to grant such consequential reliefs under the heading "any other relief deemed just and reasonable by this Honourable Court" as prayed in the application provided that those orders are consequential and reasonable. This is line with the decision of the Federal Court in *Lim Eng Key v. Jaafar bin Mohamed Said* [1982] 2 MLJ 156 which affirmed that the prayer "any other relief which this Honourable Court deem fit to grant" must not be treated as a mere ornament to pleadings devoid of any meaning. Therefore the court makes the necessary consequential orders as prayed above.